



**Statement of**  
**Stuart L. Weinstein, M.D.**  
**on the subject of**  
**Medical Liability Reform:**  
**Cutting Costs, Spurring Investment, Creating Jobs**  
**before the**  
**Committee on the Judiciary**  
**U.S. House of Representatives**  
**January 20, 2011**

## INTRODUCTION

Thank you, Chairman Smith and Ranking Member Conyers for holding this important hearing to consider the unfinished business of fixing our country's broken medical liability system. I am grateful for the opportunity to appear before this honorable committee, which has a long and proud history of righting many of the nation's wrongs. Ending the inequities and inefficiencies in our medical liability system is yet one more challenge that I am hopeful this committee will meet.

If I could, I'd like to take just a moment to present my credentials. I am currently the Ponseti Chair and Professor of Orthopaedic Surgery and Professor of Pediatrics at the University of Iowa. I have been a practicing physician for more than 35 years specializing in pediatric orthopaedic surgery. I am the past president of the American Academy of Orthopaedic Surgeons, the American Orthopaedic Association, the Pediatric Orthopaedic Society of North America, the American Board of Orthopaedic Surgery and former chairman of Doctors for Medical Liability Reform.

Thank you again for the opportunity to appear here today. I'd like to begin by asking each of you to put yourself in someone else's shoes. Imagine that you are a young mother-to-be living in a rural area of our nation worried about your first baby. Will it be healthy? Will the delivery go smoothly? Will I get to the hospital in time? For most mothers that last question is usually the easiest to answer. But not for all mothers. Imagine what could happen with no OB-GYN practitioner in your area or if your local health care facility had closed its doors to obstetrics. Instead of a quick trip to a hospital just a few minutes or miles away when labor begins, you are forced to race perhaps a hundred miles to deliver the most precious gift you will ever receive: your child.

Now, I'd like you to imagine yourself a young doctor facing, what should be an exciting decision, that of choosing a medical specialty. You know you will be leaving medical school with as much \$100,000 or more in debt. You know there is great need for OB-GYNs, neurosurgeons, trauma physicians and general surgeons. But you also know that your liability insurance rates will be dramatically higher in these specialties, and that your chances of being the target of a personal injury lawsuit will be much greater. You'd like to go into trauma medicine and return to your hometown hospital. But, you decide to choose a "safer" specialty and because your state hasn't passed liability reform, you move to another state with a friendlier litigation environment.

Finally, a last scenario. This time you are a 50-year-old orthopaedic surgeon. You've been practicing medicine for three decades but you are facing a similar dilemma as that young doctor fresh out of medical school -- the high cost of liability insurance and the threat of potential litigation. To reduce your liability, you decide to avoid high-risk cases, like trauma victims or maybe you decide to retire altogether.

Three different stories -- all with the same ending. Patients in need likely losing access to quality and affordable health care. Patients like the high-risk woman who can't find a local doctor for her prenatal care. Or a senior side-lined with painful arthritis who must

wait perhaps months for a knee replacement because the only orthopaedic surgeon in town has a waiting list a mile long. Or the accident victim who might have been saved if the nearby trauma center hadn't closed for lack of ER physicians to staff it.

Sadly, situations like these are real in areas across the country. In 2002, Las Vegas became the only city of its size in the country without a level-one trauma center when dozens of doctors serving the University Medical Center's trauma center resigned amidst a growing liability crisis.<sup>1</sup> The trauma center closed its doors leaving the people of southern Nevada without the kind of cutting edge care that a world-class trauma center can provide. Patients had to go as far away as Los Angeles to get life saving care. Two years later, voters passed a ballot initiative locking in a package of medical liability reforms that finally ended the crisis.

Less than two weeks ago, this very institution was reminded of the value of a level-one trauma center. When dealing with brain injuries, like so many other traumatic injuries, minutes matter. Without prompt access to a premier trauma department, the positive outcome we see today might have been very different.

The impact of the nation's broken medical liability system extends from physicians and health care providers to patients and all Americans.

Medical lawsuit abuse is also driving up health care costs at a time when the nation is still reeling from one of the worst recessions in modern times. And when health care costs go up, employment will likely go down.

As doctors fall back on defensive medicine to protect themselves and their practices from abusive lawsuits, the overall costs of health care rise for patients and employers, punishing business, especially small business, and eroding our competitiveness in a global economy. Because doctors face large fixed costs associated with paying steep medical liability premiums, they have reduced resources that could be spent on hiring nurses and other support staff to help deliver quality care. Finally, fewer resources mean less money to invest in medical technology and equipment, which harms economic growth in key industries.

Clearly, the medical liability system exacerbates the already difficult challenge of providing improved access to health care while ensuring the quality of care for more than 300 million Americans and, moreover, is a drag on our weak economy.

Time is running out on our healthcare system. So, I am here today to ask you to take action. I ask you to create a climate for patient centered care by reforming the medical liability system that continues to put everyone's health care at risk.

Despite some successful state initiatives to rein in medical liability costs, medical lawsuit abuse remains a national problem. Congressional leaders and the President acknowledged as much by placing demonstration projects in the Patient Protection and

Affordable Care Act, but those projects will not be sufficient to remedy this problem in any serious way.

## **CONSENSUS ON THE NEED FOR MEDICAL LIABILITY REFORM IS GROWING**

The current system is clearly broken, and there is widespread agreement among lawmakers, health care policy experts, opinion leaders and the public that reform is needed and needed now. In a recent *New York Times* editorial (10/20/10), former OMB Director Peter Orszag wrote of the health care reform bill, "...it does almost nothing to reform medical malpractice laws. Lawmakers missed an opportunity to shield from malpractice liability any doctors who followed evidence-based guidelines in treating their patients."<sup>2</sup> We agree.

Senator Orrin Hatch said in an ABC television interview with Senator John Kerry, "We've got to find some way of getting rid of frivolous cases, and most of them are." Kerry responded, "And that's doable, most definitely."<sup>3</sup>

In September 2009, HHS Secretary Kathleen Sebelius admitted in a news conference, "...we've got a situation where there are frivolous lawsuits being filed against practicing physicians, discouraging some from practicing in certain areas."<sup>4</sup> We agree.

Even more recently, both the Bipartisan Policy Center's Debt Reduction Task Force and the National Commission on Fiscal Responsibility and Reform recognized the need for comprehensive medical liability reform to help address the nation's deficit.

The President himself has weighed in on the issue writing in the *New England Journal of Medicine* in Oct. of 2008, that he "would be open to additional measures to curb malpractice suits and reduce the cost of malpractice insurance. We must make the practice of medicine rewarding again." In an earlier NEJM article, he said, "the current tort system does not promote open communications to improve patient safety. On the contrary, it jeopardizes patient safety by creating an intimidating liability environment."<sup>5</sup>

We agree with that, too, and wish the President's sentiment had been reflected in the health care reform bill. Apparently, the American people agree as well and understand the threat that abusive lawsuits pose to the quality and accessibility of their health care. In a poll done by the Health Coalition on Liability and Access (HCLA) in October 2009, 69 percent of Americans said they wanted medical liability reform included in health care reform legislation. Seventy-two percent said that their access to quality medical care is at risk because lawsuit abuse forces good doctors out of the practice of medicine. A Rasmussen poll done at the same time found that 57 percent of people favored limiting jury awards.<sup>6</sup>

We believe that a consensus has emerged: health care reform without medical liability reform is not reform. Congress must finish the job.

We understand that meeting the challenges of America's complex healthcare system is not an easy task. Nor is fixing a broken medical liability system which drives up health care costs and drives good doctors out of the system, putting patients at risk.

We're not advocating doing away with medical liability. Reasonable medical liability remedies that protect the rights and interests of patients who have suffered injury through error and especially negligence must be an important part of our health care system. But the key word is "reasonable" and that is *not* how I would define our current litigation environment.

Today, I would like to talk with you about how medical lawsuit abuse is affecting providers and patients, and, at the end of the day, putting American health care at risk.

## **THE STATE OF MEDICAL LIABILITY IN AMERICA**

Let me begin with a brief situational analysis -- the state of medical liability in America. There is no question that medical lawsuit abuse is undermining both our healthcare system and the doctor-patient relationship. Medical liability has devolved from a system designed to protect patient rights and improve the quality of health care, to a system designed to reward personal injury lawyers looking for big payoffs in the guise of seeking justice.

The trial bars' own track record speaks to the dubious legitimacy of the majority of their litigation. In 2009, 64 percent of all medical liability cases were withdrawn, dropped or dismissed as being without merit, according to the Physician Insurers' Association of America. Less than one percent (0.8 percent) resulted in a verdict favoring the plaintiff, yet these cases continue to be filed as personal injury lawyers play roulette with America's doctors, hospitals and patients.<sup>7</sup>

But a poor win/loss record hasn't stopped personal injury lawyers. Instead, they have become even more aggressive in their tactics. In 2009, the Institute for Legal Reform released a report showing that television ads for medical liability lawsuits increased by 1,400 percent in four years as spending reached an all-time high of \$62 million -- up from just \$3.8 million in 2004.<sup>8</sup>

Richard A. Epstein, director of the law and economics program at the University of Chicago Law School put it this way in an *American Medical News* story that compared U.S. litigation costs with those of other countries. He said, "Nobody is as hospitable to potential liability as we are in this country. The unmistakable drift is we do much more liability than anybody else, and the evidence on improved care is vanishingly thin."<sup>9</sup>

We know that our medical liability costs are at least twice those in other developed countries<sup>10</sup> and make up 10 percent of all tort cases. That's the macro perspective, but what about the physicians, hospitals or other health care providers on the wrong end of a lawsuit? They can expect to pay an average of \$26,000 to defend a case that is dropped

before trial and as much as \$140,000 if the case actually goes to court, regardless of the merits.<sup>11</sup> So, even when good doctors win their lawsuits, which happens the vast majority of the time, they still lose. They lose valuable patient time, money, and peace of mind while watching their professional reputations impugned.

It is clear that no doctor is safe from lawsuit abuse, but as studies have shown, some are more vulnerable to abusive litigation than others because of their specialty or the location of their practice. Today, one-third of orthopedists, trauma surgeons, ER doctors and plastic surgeons will probably be sued in any given year.<sup>12</sup> Neurosurgeons face liability lawsuits more often – every two years on average.<sup>13</sup>

OB-GYN physicians are another favorite target of personal injury lawyers with nearly three out of five OB-GYNs sued at least twice in their careers. The American College of Obstetricians and Gynecologists (ACOG) 2009 Medical Liability Survey found nearly 91 percent of OB-GYNs surveyed had experienced at least one liability claim filed against them and sadly, we know most of the cases are without merit.<sup>14</sup>

Doctors in these specialties have not only faced the brunt of abusive lawsuits but, over the last decade, have seen their insurance premiums rise exponentially. While insurance premiums have leveled off recently or decreased slightly in some areas, they remain a serious burden for many doctors across the country. Moreover, with the implementation of the new health care bill, we may discover this has been a brief lull before the storm.

The excessive number of claims also has reached a plateau in the last couple of years, but the cost and size of the claims have not. In 2009, our most recent data, the average jury award escalated to almost \$600,000 from about \$280,000 in 1996.<sup>15</sup> Those kinds of payouts are even attracting the attention of investors, banks and hedge funds that are investing in medical liability lawsuits in hopes of a big payoff. Yes, medical lawsuit abuse has become one of the financial industry's latest hot tickets.<sup>16</sup>

Until Congress acts to stop what is, in reality, little more than legal harassment in most cases, doctors will remain in an untenable position, one that is forcing them to change the way they practice medicine, in large measure as a matter of self-preservation. That's not good for doctors, patients or the country's economic future. But they are trapped in a system that benefits lawyers, not patients. As Michelle Mello, a Harvard professor of law and public health, put it, "It would be hard to design a more inefficient compensation system or one which skewed incentives more away from candor and good practices."<sup>17</sup>

## **THE RISE OF DEFENSIVE MEDICINE – ASSURANCE AND AVOIDANCE BEHAVIOR**

Today, "the fear of lawsuits is driving many providers to order tests and procedures that may serve mainly to protect themselves from predatory lawsuits." This practice of "defensive medicine" is a contributing factor in increased health care costs. Philip K. Howard, Chairman of Common Good, a legal reform coalition, said this in an April, 2009 *New York Times* opinion piece on defensive medicine.

“The legal system terrorizes doctors. Fear of possible claims leads medical professionals to squander billions in unnecessary tests and procedures... Defensive medicine is so prevalent that it has become part of the standard protocol...”

For anyone concerned about reducing health care costs, keeping the deficit down and creating jobs, those words should set off alarm bells.

It's important to understand that defensive medicine isn't relegated to simply prescribing an extra test or two. Defensive medicine, in fact, has two major components: assurance behavior and avoidance behavior and each has consequences for patient care, and long term, for the public good.

#### Assurance Behavior Drives Increased Costs

*Assurance behavior* entails ordering tests, particularly imaging tests, but it might also include performing diagnostic procedures or referring patients for consultation in order to provide an extra layer of protection against abusive lawsuits -- and it is common practice. A June study in the *Archives of Internal Medicine* found nine in ten physicians said doctors engaged in assurance behavior ordering more tests and procedures than patients need in order to protect themselves against lawsuits.<sup>18</sup> While the estimated cost of lawsuit abuse varies, a 2006 study done by PricewaterhouseCoopers, estimated costs upwards of \$210 billion a year.<sup>19</sup> The respected research firm found, “While the bulk of the premium dollar pays for medical services, those medical services include the cost of medical liability and defensive medicine...Defensive tests and treatment can pose unnecessary medical risks and add unnecessary costs to healthcare.”

A more recent Gallup survey of American physicians found the fear of lawsuits was the driver behind 21 percent of all the tests and treatments ordered by doctors, which equates to 26 percent of all health care dollars spent. That comes to a staggering \$650 billion.<sup>20</sup> According to a study of medical liability costs and the practice of medicine in *Health Affairs*, overuse of imaging services alone, driven by fear of lawsuits, costs as much as \$170 billion a year nationally.<sup>21</sup>

Looking at state data, a study by the Massachusetts Medical Society revealed that 83 percent of the physicians surveyed reported practicing defensive medicine and that an average of 18 to 28 percent of tests, procedures, referrals and consultations and 13 percent of hospitalizations were ordered for defensive reasons. Estimates are that assurance behavior costs Massachusetts a staggering \$1.4 billion annually.<sup>22</sup> Another study, this one in Pennsylvania, found 93 percent of physicians said they practiced defensive medicine.<sup>23</sup>

As sobering as these numbers are, they reflect an even bigger concern -- that what begins as a defense mechanism against lawsuit abuse becomes the standard of care, necessarily increasing its cost without an equal increase in patient benefit. Our nation simply cannot afford our current medical liability system.

### Avoidance Behavior Threatens Access to Care

But assurance behavior is only part of the practice of defensive medicine. The second component is *avoidance behavior*. Physicians, especially in the target specialties, begin to restrict their practices and eliminate high-risk procedures or those procedures prone to complications such as trauma surgery, vaginal deliveries and brain surgery to name three. Physicians may also avoid patients with complex problems or patients they suspect might be litigious.

Over the years, a range of studies has shown both the financial and human costs of avoidance behavior. Forty-four percent of neurosurgeons have limited the type of patients they see and of these, 71 percent no longer perform aneurysm surgery, 23 percent no longer treat brain tumors and 75 percent no longer operate on children.<sup>24</sup> Orthopedic surgeons, my specialty, are under similar pressures with similar outcomes. Fifty-five percent say they avoid certain procedures because of liability concerns. One in five has stopped emergency room calls, six percent don't perform surgery at all and one in twenty has retired early.<sup>25</sup>

Avoidance behavior will only lead to more doctor shortages particularly in high-risk specialties as young doctors reject these specialties in favor of lower risk medical fields that don't attract the attention of predatory personal injury lawyers and their lawsuits. The American Hospital Association has found that 55 percent of hospitals have difficulty recruiting doctors because of medical liability concerns.<sup>26</sup> Three out of four emergency rooms say they have had to divert ambulances because of a shortage of specialists and more than 25 percent lost specialist coverage due to medical liability issues.<sup>27</sup>

One emergency room physician was quoted as saying, "The lack of on-call specialists affects the numbers of patients referred to tertiary care facilities even for basic specialty related diseases (like orthopedics). This adds to emergency department crowding in some facilities, and it means that patients have to travel across town or greater distances for a relatively simple problem that could have been resolved if the specialist had been on call at the initial facility."<sup>28</sup>

### Defensive Medicine Threatens Women's Health Care

Women pay an especially high price when it comes medical liability and access to care. "...the medical liability situation for ob-gyns remains a chronic crisis and continues to deprive women of all ages -- especially pregnant women -- of experienced ob-gyns," said Albert L. Strunk, M.D., deputy executive vice president of ACOG.<sup>29</sup>

ACOG's own data proves the point. According to their 2009 survey, 63 percent of OB-GYNs said they had made changes to their practice because of the risk or fear of liability claims. Between seven and eight percent have stopped practicing obstetrics altogether. In fact, ACOG found that the average retirement age of practicing obstetrics was 48. Once upon a time, before the medical lawsuit abuse crisis, that was considered mid-point in a doctor's career.<sup>30</sup>



Looking state by state, the picture is even more alarming. For example in 2007, Hawaiian women faced the harsh reality that 42 percent of the state's OB-GYNs had stopped providing prenatal care.<sup>31</sup> Dr. Francine Sinofsky, an OB-GYN in East Brunswick, N.J., says two of her practice's seven members no longer practice obstetrics due to the cost of medical liability. One who practices gynecology only pays \$14,000 a year for liability insurance while another who practices obstetrics as well pays more than \$100,000.<sup>32</sup>

In 2008, 1500 counties in America, eight counties in New York alone, didn't have a single obstetrician as liability issues chased good doctors out of obstetrics.<sup>33</sup> This shouldn't be happening in America -- to American moms and babies.

But the negative impact of lawsuit abuse on women's health goes beyond obstetrics. Today, the number of radiologists willing to read mammograms is shrinking, exacerbated by the decreasing number of medical residents choosing radiology as their specialty. The reason is simple. A failure to diagnose properly is the number one allegation in most liability lawsuits.<sup>34</sup> That makes radiologists the number one group of physicians affected.<sup>35</sup> Abuse of the litigation system is putting women at risk.

## **OUR HEALTH CARE FUTURE: FEWER DOCTORS AND MORE PATIENTS**

As doctors, we want every American to get the quality health care they need. But the Patient Protection and Affordable Care Act, passed with the best of intentions last year, will likely make an already difficult situation worse as the demand for doctors increases and the supply, thanks in part to lawsuit abuse, fails to meet that demand. More than 30 million people may be added to the healthcare rolls in the next few years. Add to that an aging population and a toxic medical litigation environment and you've got a prescription for a significant shortage of doctors over the next twenty years.

The Association of American Medical Colleges (AAMC) has predicted that once the new health care reform provisions take effect in 2015, in just four short years, "the shortage of physicians across all specialties will more than quadruple to almost 63,000."<sup>36</sup> Another group, the American Academy of Family Physicians, has projected the shortfall of family physicians will reach 149,000 by 2020.<sup>37</sup>

AAMC also found the country will need 46,000 more surgeons and other specialists to meet demand in the next decade and that those living in rural or inner city locations will suffer the most severe impact. "This will be the first time since the 1930s that the ratio of physicians to the population will start to decline," according to Dr. Atul Grover, of the AAMC.<sup>38</sup>

A case in point is the access to care crisis in the state of Pennsylvania. According to a *Bucks County Courier Times* article in February 2009, 17 maternity wards had closed their doors since 1997 and the Philadelphia suburb of Chester County had no trauma

center to treat a half a million residents. As grim as those statistics are, they were only the tip of the iceberg.

Despite an outstanding medical education system, Pennsylvania's new doctors were choosing to leave to set up practice in states with friendlier liability environments. In 1992, 60 percent of residents stayed in the state when they finished medical training. By 2009, only 20 percent were willing to risk practicing in a state where liability reforms had languished.<sup>39</sup> Pennsylvania was also facing the hard fact that its specialist population was aging – more than 40 percent of its practicing physicians were over 50 – and younger doctors were either avoiding needed specialties or fleeing Pennsylvania's deteriorating liability climate.<sup>40</sup>

The current physician shortage Pennsylvania is experiencing is only expected to get worse. According to a University of Pennsylvania expert, Pennsylvania currently faces a shortage of 1,000 physicians – about 7 percent. Over the next decade, that shortage is expected to balloon to 20 percent, forcing Pennsylvania patients to drive further and wait longer for health care services.<sup>41</sup>

The Pennsylvania story and so many others like it around the country should be a wake-up call for anyone who is concerned about preserving access to quality care in America. Yet, the medical lawsuit system that has plagued the nation's health care providers for decades remains as a disincentive to physicians and a serious roadblock to real health care reform. Medical liability issues certainly aren't the only factors driving doctor shortages, but why maintain a system that we know is only adding to the problem?

If medical liability insurance premiums and litigation rates remain high, doctors will continue to be discouraged from entering the high-risk specialties our healthcare system will need in coming years. Defensive medicine is the antithesis of health care reform. It increases health care costs and has the potential to lessen the quality of care that we strive to provide our patients every day. But doctors are human. With the threat of predatory lawsuits hanging over their heads, defensive medicine will continue to be an understandable response until real reform is enacted.

## **GOING FORWARD**

There are remedies to fix this broken medical liability system, but it is imperative that we act now before defensive medicine practices and the costs that go with them become the standard of care. The good news is we know what works because the states have led the way forward with a proven track record of success across the country. Comprehensive medical liability reform that includes full compensation for economic damages (lost wages, medical expenses) and reasonable limits on non-economic damages ("pain and suffering") are reducing health care costs, attracting doctors to their states, strengthening the doctor-patient relationship and most important – preserving access to quality care.

I'd like to give you just a few good examples. The first is California, which has been a leader in medical liability reform for more than 30 years. The state's Medical Injury Compensation Reform Act (MICRA) has held down health care costs and improved access to care while protecting consumers' rights.<sup>42</sup> We believe MICRA is a good model for federal reform efforts.

In Missouri, liability reform has resulted in doctors' insurance premiums at 17 percent below those states without limits on non-economic damages and as of 2009, new medical liability lawsuit filings reached a 10-year low.<sup>43</sup> Alaska, another leader in liability reform, has the sixth lowest medical costs in the country along with strong expert witness laws that are keeping doctors where they belong – in the exam room, not the courtroom.<sup>44</sup>

Mississippi is yet another proof point when it comes to the positive effects of medical liability reform. Mississippi once was one of the country's hotbeds of lawsuit abuse. But in 2004, the state acted to create a hard \$500,000 limit on non-economic damages and put other reforms in place to bring equity back to the liability system.<sup>45</sup> The results? The number of medical liability lawsuits fell by nearly 90 percent and physicians saw their liability insurance premiums decrease anywhere from 30 to 45 percent.<sup>46</sup>

But perhaps the most remarkable story of successful medical liability reform is the "Texas Miracle," an amazing turnaround for a state that once had the dubious distinction of being named one of the country's "judicial hellholes" by the American Tort Reform Association. But before Texas took steps to rein in runaway lawsuit abuse, it had earned the title. Doctors were leaving the state in droves and patients were the real losers. When it came to the number of physicians per capita, Texas ranked near the bottom, 48<sup>th</sup> out of the 50 states with just 152 MD's for every 100,000 people, far below the national average of 196.<sup>47</sup> Over a four-year period, Texas physicians were hit with insurance premium rate hikes of between 22.5 and 128 percent. Hospitals saw their rates more than double.<sup>48</sup> The litigation atmosphere had become so toxic that there were 300 lawsuits for every 100 doctors in some areas of the state.<sup>49</sup>

By 2003, the crisis was so severe the legislature took action to put limits on non-economic damages and to block the plans of personal injury lawyers to use the courts to overturn the legislation. The people of Texas then passed Proposition 12, a constitutional amendment that locked in the limits. The steady stream of doctors fleeing the state reversed and Texas was faced with a new "problem: "trying to deal with a big backlog in the state's licensing system.

The charts in the appendices following this testimony illustrate the positives outcomes that medical liability reform has brought to Texas. The number of liability filings dropped significantly and specialists who had been leaving the state saw dramatic increases in the years following reform.

Medical liability reform has led the state's largest insurers to lower rates, one as much as 31% and health care providers have seen more competition for their insurance business

as new firms have entered the market.<sup>50</sup> After passage of the liability reform in 2003, 82 counties have seen net gains in the number of emergency physicians. What has been especially heartening have been the increases in 43 medically underserved counties.<sup>51</sup> As I'm sure Chairman Smith knows, the Texas reforms became the basis for reform legislation introduced in the U.S. Congress in 2006.

## **MOVING TO A FEDERAL SOLUTION TO MEDICAL LAWSUIT ABUSE**

We strongly believe that comprehensive reforms of the kind passed in Texas and California should be applied nationwide through federal medical liability reform legislation.

HCLA has outlined several legislative proposals that preserve state laws already working effectively to make the medical liability system fair for both patients and health care providers but also broaden coverage across the nation.

Among HCLA's proposed reforms are:

- Full compensation for all economic damages, but reasonable limits on non-economic damages
- A 3-year limit on the statute of limitations after the date of injury
- Limiting excessive attorney's fees
- Expert witness requirements
- More transparency in compensation
- Joint and several liability

In October 2009, the CBO responded to a request from Senator Orrin Hatch for an analysis of proposals to limit medical liability lawsuits in order to reduce health care costs and the practice of defensive medicine. The CBO wrote "more recent research has provided additional evidence to suggest that lowering the cost of medical malpractice tends to reduce the use of health care services." It found that if a package of reforms similar to those implemented in the states -- such as limits on noneconomic damages and other reforms -- was enacted at the federal level, it would reduce health care spending, lower costs and actually increase federal tax revenues. Together, this would mean a reduction in the federal budget of \$54 billion over the next 10 years.

While the state-by-state approach to reform has paid dividends to some patients, it is clear that state liability reforms, including limits on non-economic damages, are always under the threat of legal action by personal injury lawyers looking to maintain a system that only serves to enrich them.

In many of those states where reforms are bringing the practice of medicine back into balance, personal injury lawyers have used the courts to attempt to overturn not only legislative liability reform but to subvert the will of the people who have voted for medical liability reform through ballot initiatives. Texas is a good example of a jurisdiction in which those efforts, thankfully, have failed so far.

Illinois wasn't so lucky when the State Supreme Court struck down reforms passed in 2005. Despite clear progress in terms of lessening the medical liability crisis while the reforms were in place, today the state's doctors find themselves back in the quicksand of lawsuit abuse. The same can be said for Georgia's doctors who lost their liability protections when the Georgia Supreme Court overturned the state's liability limits last year. Further, in states like Pennsylvania passing medical liability reform is proving to be particularly challenging. Meanwhile, patient access to care in that state continues to be threatened.

Overturning reforms isn't the only item on the trial lawyers' "to do" list. One of the most disturbing new initiatives is their attempt to dramatically expand the ability to sue doctors. The best example is a ruling by the Massachusetts State Supreme Court that reinstated a suit against a doctor for prescribing a blood pressure medicine to a patient who later struck and killed a pedestrian with his car.

The American people clearly understand the issue of liability reform and the motives behind the raft of lawsuits trial lawyers are bringing to stop reform in its tracks. The Health Coalition on Liability and Access poll done in October 2009 found that by a wide margin, 70 percent of Americans support full payment for lost wages and medical expenses *and* reasonable limits on awards for non-economic "pain and suffering." Sixty-eight percent of those polled also favor a law to limit the fees personal injury attorneys can take from an award or settlement.

We know medical liability reform works for patients and doctors. Who it doesn't work for are personal injury lawyers dependent on a failed system that puts profit ahead of patients and affordable, quality care.

Today, there is broad bipartisan support for liability reform. The U.S. House of Representatives has passed numerous bills that would help solve the problems that plague our tort system when it comes to both patients' rights and physician protections. Unfortunately, none of those reforms received Senate approval and despite mounting evidence in the states of the benefits of medical liability reform, last year's Patient Protection and Affordable Care Act (PPACA) did not do enough to address the situation.

In fact, legitimate concerns have been raised that PPACA creates new causes of action for medical liability lawsuits, thus potentially greatly increasing the number of liability claims that are filed. The potential harm done by a flood of new lawsuits arising under the Act only further demonstrates the need to fix our medical liability system before we are thrown back into the crisis from which we only recently emerged.

## CONCLUSION

But it is a new day. We are encouraged that so many Members of the 112<sup>th</sup> Congress are committed to medical liability reform. And we want to work with this Committee and others in the Congress toward real medical liability reform through a federal remedy.

Unfortunately, the health care reform bill wasted the opportunity to move forward with real liability reform and the reason was clear. Former Governor and Democratic National Committee Chairman Howard Dean even admitted it. When asked in a health care town hall meeting he said, "The reason that tort reform is not in the bill is because the people who wrote it did not want to take on the trial lawyers...and that is the plain and simple truth."<sup>52</sup>

I'm here today to ask you on behalf of doctors, nurses, hospitals, and most importantly, patients to finish the job. Three hundred million Americans want and need a healthcare system that is both accessible and affordable.

Reform the medical liability system before we reach the crisis we know is coming. Before health care costs go higher, and unemployment along with it. Before defensive medicine and doctor shortages change the very nature of our healthcare system. Before it's too late.

I'd like to close by telling you about a wonderful physician practicing not far from here in Maryland, Dr. Carol A. Ritter. She is a graduate of the Medical College of Wisconsin and on her medical school application more than 25 years ago, she wrote of her desire to help the underserved through medicine. She studied to become an OB-GYN, but in 2004 gave up obstetrics because of sky rocketing insurance premiums – up 69 percent in 2002 and 33 percent in 2003. When her insurance hit \$120,000 a year, she did the math and realized that the insurance bill amounted to 85 percent of her obstetrics income. She couldn't deliver enough babies to pay the trial bar's tab.<sup>53</sup>

Today, Dr. Ritter maintains a gynecology practice and still delivers babies, but not in the U.S. She travels to places like Honduras and Haiti and Bosnia where she joins in relief efforts helping women in these impoverished places get the obstetrical care they desperately need including delivering babies. Dr. Ritter says she does it for "the sheer joy" of doing what she does best but can't do in Maryland simply because she cannot afford the risk or the insurances rates. I would say to you today, ladies and gentlemen, that something is very wrong when a committed physician like Dr. Carol Ritter can't bring an American baby into the world for fear of a frivolous lawsuit.

You have the ability and the responsibility to help right that wrong. Thank you very much.

## ENDNOTES

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- <sup>1</sup> "Liability Concerns: Trauma center closes: ERs gear up," Joelle Babula, *Las Vegas Review-Journal*, 7/4/02
- <sup>2</sup> "Malpractice Methodology," Peter Orszag, *New York Times*, 10/20/10
- <sup>3</sup> "This Week with George Stephanopolous," 8/30/09
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- <sup>5</sup> "Making Patient Safety the Centerpiece of Medical Liability Reform," Sen. Barack Obama and Sen. Hillary Clinton, *New England Journal of Medicine*, 5/25/06
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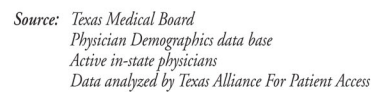
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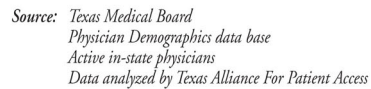
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# 99 Texas Counties Lost at Least One High-Risk Specialist Pre Reform: 2001-2003



# 125 Texas Counties Added at Least One High-Risk Specialist Post Reform: 2004-2008

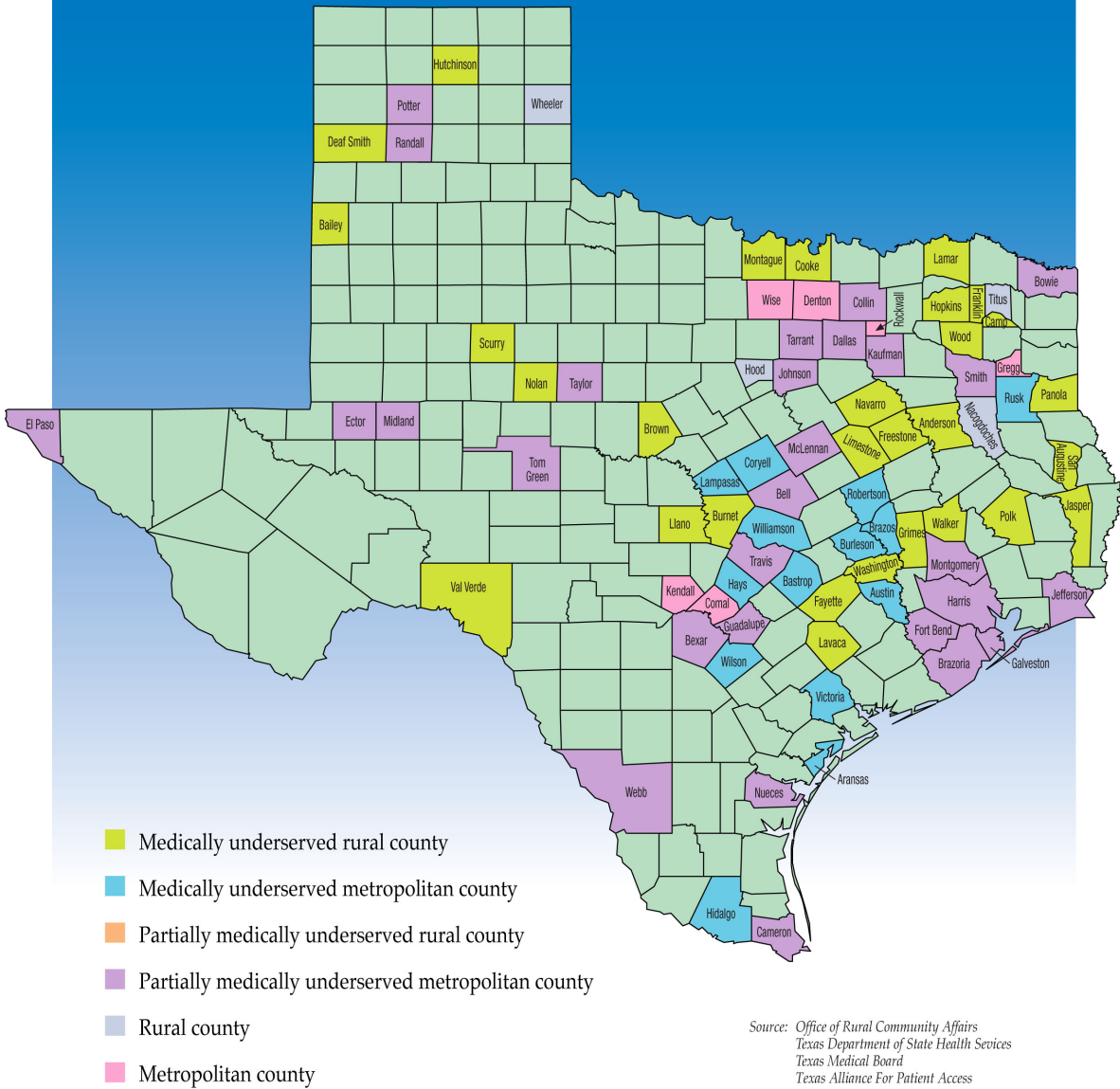


# **APPENDIX C:** **EIGHTY-TWO TEXAS COUNTIES SEE GAINS IN ER DOCS**

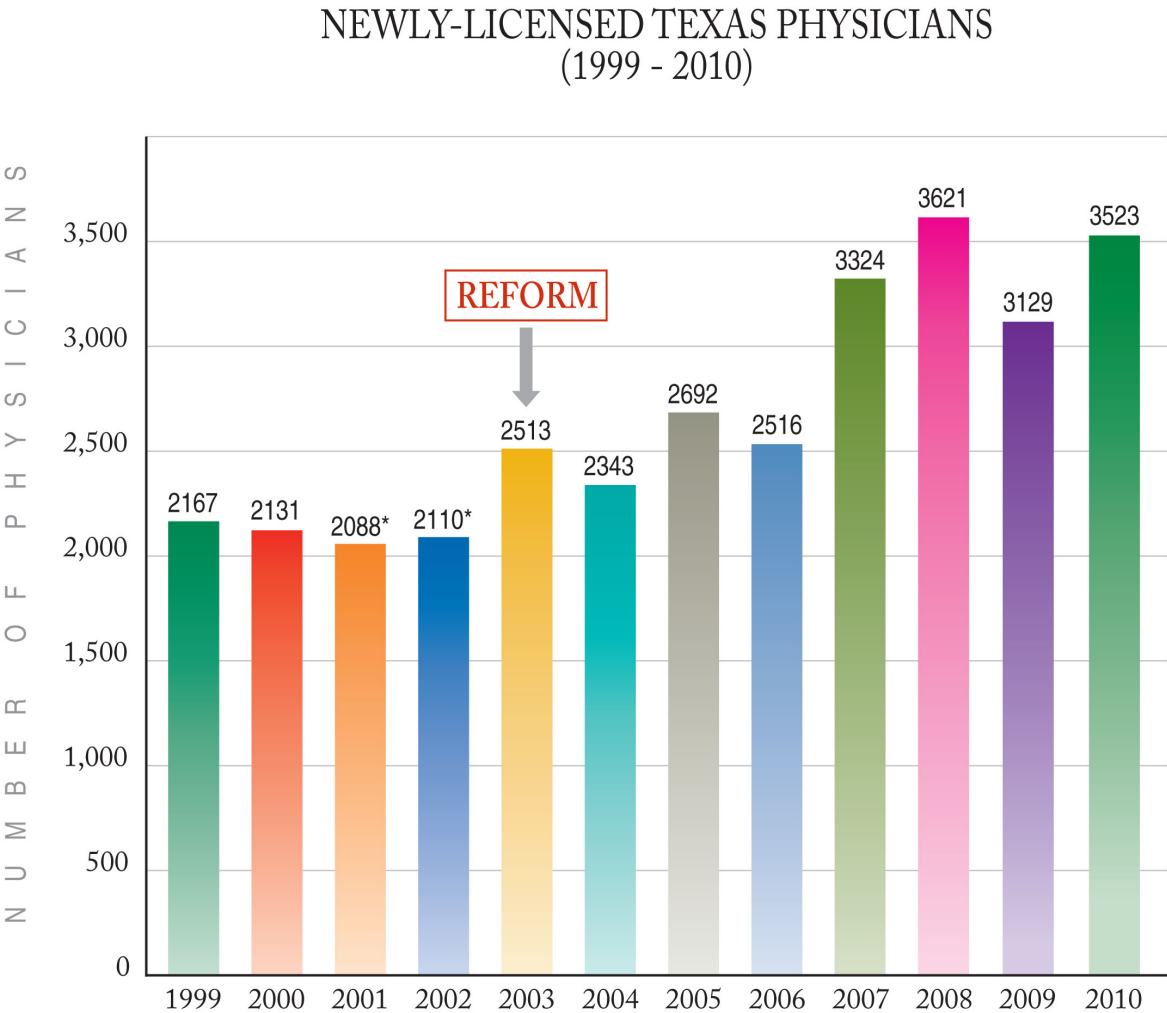
## **EIGHTY-TWO TEXAS COUNTIES SEE GAINS IN ER DOCS**

Eighty-two Texas counties have seen a net gain in emergency physicians since the passage of reforms six years ago, including 43 medically underserved counties and 29 counties that are partially medically underserved.

In all, 49 metropolitan counties and 33 rural counties have seen a net gain in ER docs.



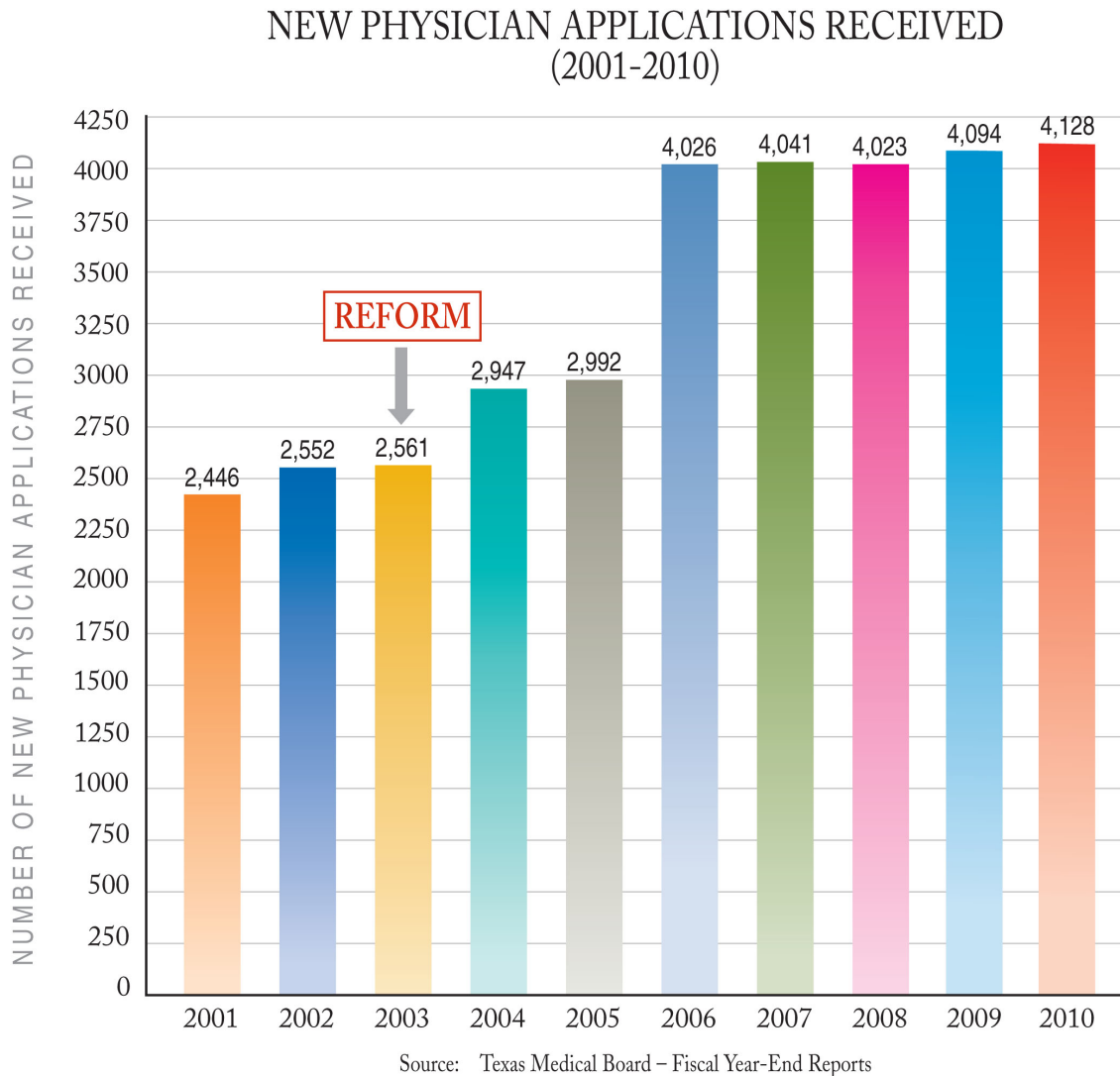
**APPENDIX D:  
NEWLY-LICENSED TEXAS PHYSICIANS (1999 – 2010)**



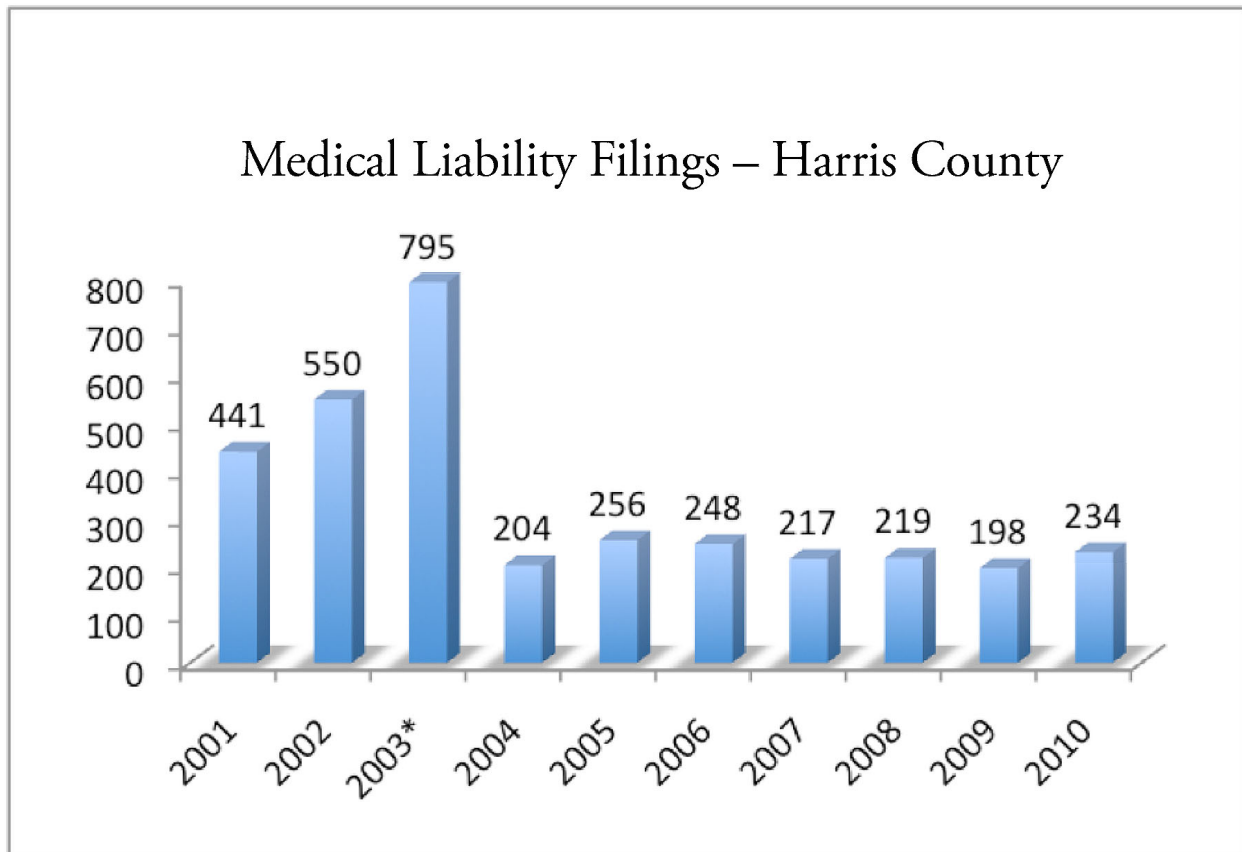
Source: Texas Medical Board  
Medical Education Department, Texas Medical Association

*\* In FY 2001, the Texas Medical Board meeting scheduled for late August was postponed until September 2, 2001, moving it to FY 2002. At that meeting, 701 initial licenses were issued and 17 licenses were reissued. The statistics have been adjusted based on the assumption that the group licensed in September (FY 02) would have been licensed in August (FY 01).*

**APPENDIX E:**  
**NEW PHYSICIAN APPLICATIONS RECEIVED (2001 – 2010)**



**APPENDIX F:  
MEDICAL LIABILITY FILINGS – HARRIS COUNTY**



\*Denotes rush to courthouse to beat effective date of new law